LEAD1 ASSOCIATION

Workplace Retaliation Guidance

White Paper Prepared for LEAD1 Association Athletic Departments by LEAD1 Association

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The LEAD1 Association would like to thank Barbara Osborne and Erin Buzuvis for their contributions to this White Paper

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Part I: Executive Summary

Since Title IX passed in 1972, the number of women athletes in college sports has increased from 30,000 before Title IX to 193,000 today. What is not well known is that Title IX has not been so good for female coaches and administrators. When Title IX was passed, women coached 90 percent of women's teams. Today, that figure has dropped to 43 percent.

There are a lot of reasons for this decline. As more money has gone into women's sports, women's coaching jobs have become more attractive for men coaches. In addition, the consolidation of men and women's athletic departments has decreased the number of jobs in women's college athletics.

A consequence of differential treatment in employment has resulted in a significant increase in the number of female coaches and administrators suing their universities for sex discrimination. This litigation has been fueled by a 2005 Supreme Court decision, **Jackson vs. Birmingham Board of Education**, which ruled that Title IX covers retaliation due to complaints over sex discrimination.

Since the Supreme Court decision, 37 female coaches and administrators have filed retaliation lawsuits against their universities. There are no limits on monetary damages under Title IX, and these lawsuits create significant legal expenses. Since 2005, LEAD1 schools have spent approximately $50 million in settlements, including one lawsuit that settled for $19 million.

LEAD1 Retaliation Lawsuits Since 2005:

- **2007:**
  - U.C. Berkeley
  - Fresno State
- **2008:**
  - San Diego State
  - Iowa State
- **2010:**
  - Ball State
- **2011:**
  - Minnesota
- **2012:**
  - Tennessee
- **2013:**
  - San Diego State
  - Texas
- **2014:**
  - Iowa

Part II: Recommendations

1) Building a strong workplace culture:

LEAD1 athletic directors manage the expectations of many different stakeholders associated with their athletic programs including student-athletes, administrators, donors, and families of student-athletes. Because it is difficult to manage all of these expectations, athletic directors will almost always be subject to scrutiny. To make sure these pressures do not interfere with making fair employment decisions, LEAD1 athletic directors and other decision-makers should focus on building a strong workplace culture - **specifically, focused on consistent enforcement of established university workplace policies. It is also critically important that athletics directors consider implementing their own provisions and policies providing equal opportunities for all.**

In addition, **participating in small group educational settings** (instead of large, department-wide training sessions), where the consequences of problematic decision-making can be discussed on a one-on-one basis, may also help decision-makers avoid the potential of double standards (e.g. inconsistent treatment between male and female employees) in the hiring process. For example, private dialogue with outside counsel may help decision-makers understand the ramifications of lack of equal treatment in employment and in the hiring process (i.e. the potential for a lawsuit and the damage to reputation that may follow).[1]

Decision-makers should also expose themselves to a diverse pool of candidates – seeing multiplicities of identities come under a single label could help avoid the possibility of generalizing or stereotyping in the hiring process.[2]

2) Transparency and proactiveness in documentation:

Equal treatment in employment decisions: When hiring employees, **clearly communicating expectations, limits, and philosophies, such as outlining measurable criteria in writing relative to any specific priorities,** can help prepare for the possibility of future litigation. Further, **crafting job descriptions based on non-discriminatory considerations**, for example, by stressing in contractual language that mere athletic performance is only one aspect of the decision whether to renew a contract, would likely reduce the likelihood of unfairly evaluating candidates.[3]

Eliminating potential bias in the hiring process: Because the litigation process favors plaintiffs who can point to discrepancies between how they were treated and others in similar positions, **making decisions based on measurable job criteria** will help the decision-maker argue that a hiring decision was based on legitimate and non-discriminatory criteria.[4]

In addition, **when using outside search firms, decision-makers should have a historical understanding of the firm's hiring record, specifically, in providing diverse and qualified candidates.**[5]

70

percent of LEAD1 schools express concern about sexual discrimination and the potential for retaliation within their athletic departments

55

percent of LEAD1 schools expressed they were not aware of the 2005 U.S. Supreme Court decision, Jackson v. Birmingham Board of Education

> Retaliation was the most frequently filed charge within the United States Equal Employment Opportunity Commission (EEOC) during fiscal year 2017
>
> - EEOC Fiscal Year 2017 Data

3) Transparent Separation:

Although it is often the case that employees in retaliation lawsuits are terminated in full compliance with their contracts, adhering to contractual terms may not always eliminate liability. Specifically, a termination decision based on a discriminatory motive, even if all contractual terms are met, is illegal under U.S. employment law. In addition to receiving money damages, courts may award remedies based on damage to an employee's reputation and the subsequent difficulty in finding another comparable position.[6] Thus, when terminating the contract of an employee, **decision-makers should consider coming to a mutually agreeable arrangement.**[7]

To help preserve the reputation of a terminated employee and ensure that their future opportunities are not tarnished, **it is critically important that decision-makers manage dialogue that may occur post separation.** Further, terminated employees may sometimes cast their former employers in an adversarial role, which could lead to broader reputation concerns for decision-makers. Transparent separation can help address these concerns by solidifying language with respect to disparagement, references, and confidentiality of information – this arrangement may also strengthen personal relationships, which, otherwise, may become strained.

In addition, transparent separation could add tremendous value in establishing that the relationship between the employer and employee was mutually not a good fit. While transparent separation may not be appropriate in all cases, this process is generally undervalued given its low risk and benefits.

Part III: Why Now?

Whether written (i.e. texts and emails) or spoken, decision-makers should think carefully about their words – they should imagine themselves as if they were "testifying under oath." While an employee can always sue an employer if they wish, decision-makers can reduce the likelihood of expensive litigation by building a strong workplace culture based upon consistent enforcement of established university policies and possible implementation of their own additional policies. Clear expectations and proactiveness in documentation may also help decision-makers manage the expectations of many different stakeholders in the complex environment of NCAA Division I intercollegiate athletics.[8]

End Notes

1. Telephone Interview with Barbara Osborne, Professor of Law, University of North Carolina School of Law (Aug. 2018).
2. Osborne, supra note 1.
3. Telephone Interview with Erin Buzuvis, Professor of Law, Western New England School of Law, (Aug. 2018).
4. Osborne, supra note 1.
5. Buzuvis, supra note 3.
6. Osborne, supra note 1; Buzuvis, supra note 3.
7. Osborne, supra note 1.
8. Buzuvis, supra note 3.